



Legal Update

June 2018

The SJC holds that even though the defendant had a medical marijuana card permitting him to cultivate marijuana in his home, a number of factors apart from the twenty-two plants found in the home established unlawful possession with intent to distribute marijuana.

Commonwealth v. Richardson, 479 Mass. 344 (2018).

The defendant was an unemployed tattoo artist living in Framingham at the time of his arrest. On July 2, 2013, he obtained a written certification from a qualifying physician that approved his use of medical marijuana to treat a number of medical conditions. **The certification constituted a valid hardship cultivation registration permitting the defendant to grow up to ten ounces of marijuana every sixty days for his personal, medical use.** At the time, no medical marijuana dispensaries were in operation. Any qualifying patient with a written certification was authorized to cultivate marijuana.

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.

A few months later, the defendant called 911 to report a home invasion at his residence. The defendant told the 911 operator that three men had entered his home and "started beating the hell out of him. Police responded to the scene and spoke with the defendant who relayed that three (3) men broke into the house and one had a gun. Due to the nature of the call, police assembled a team of officers to enter the defendant's home to determine whether the suspects were still inside. The police observed a pressure cooker and an autoclave in the kitchen, a fan and blower assembly with a hose feeding it air or taking air out, and a plastic container with aluminum trays with a brown leafy substance in them. Police observed other items as well including a blow torch and numerous plastic bags in the room. Marijuana was also growing in the basement. Police secured the premises and the defendant was read his Miranda rights. The defendant stated that he had a license to grow marijuana.

Although the defendant had a license to grow marijuana, the police arrested and searched him. The police found \$2,135 in cash in his pocket. After executing a search warrant, police found twenty-two plants ranging in height from one foot to three feet tall, fertilizer, pots, and soil from the basement. Additionally, police found high intensity lights hanging over the marijuana plants, a ballast system, and other boxes of lights in the basement. There was a "fertilizer grow kit" in the basement as and a scale and plastic bags. The defendant was charged with unlawful cultivation of marijuana and possession of marijuana with intent to distribute.

Prior to trial, the defendant filed a motion to dismiss the complaint, arguing that there was no probable cause to believe he had committed the crimes charged. The court denied this motion, as well as a motion to suppress, and a jury convicted the defendant on both charges. At the trial the defendant's former girlfriend testified for the Commonwealth that the defendant rarely used marijuana. The defendant appealed.

The SJC had to consider whether the passage of the medical marijuana ballot initiative, St. 2012, c. 369, § 7 (E), supersedes Massachusetts law prohibiting the possession, cultivation, transport, distribution, or sale of marijuana for nonmedical purposes. Part of the ballot initiative allows that "a qualifying patient or a personal caregiver shall not be subject to arrest or prosecution or civil penalty, for the medical use of marijuana provided that he or she:

- (a) Possesses no more marijuana than is necessary for the patient's **personal, medical use, not exceeding the amount necessary for a sixty-day supply**; and
- (b) Presents his or her registration card to any law enforcement official who questions the patient or caregiver regarding use of marijuana.

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The act also permits qualifying patients to obtain a "hardship cultivation registration" in certain limited circumstances. A hardship cultivation registration allows the qualifying patient or the patient's personal caregiver to "cultivate a limited number of plants, sufficient to maintain a [sixty]-day supply of marijuana." *Id.* A **sixty-day supply** is defined by regulation as presumptively **ten ounces**, unless a physician certifies that a larger quantity is necessary to provide the patient with a sixty-day supply. At the time of the defendant's arrest, Department of Public Health had not begun to process hardship cultivation registrations. Since the defendant was a qualifying medical marijuana patient, he was permitted to pursue home cultivation under the act and would be protected from prosecution for cultivating marijuana for his own personal, medical use as long as he did not exceed the sixty-day supply amount.

1st Issue: Was there probable cause to issue the search warrant?

The SJC held that the police had probable cause to apply for a search warrant based on what they observed when they responded to the defendant's house for report of a home invasion. Where the target of the warrant has a valid hardship cultivation registration, facts indicating that the person is selling the marijuana or that "in the opinion of a properly qualified affiant, the number of plants exceeded the quantity necessary to grow a sixty-day supply of ten ounces" can supply probable cause. The search warrant at issue here established both. Additionally, the detective who was the affiant of the search warrant stated that based on his experience in the narcotics unit, he observed a marijuana grow operation in excess of the permissible amount allowed for medical use. The SJC also determined that while there is no absolute limit on how much medical marijuana can be prescribed, the presumptive limit is ten ounces in a sixty-day period.

2nd Issue: Were the jury instructions related to the charge of possession with intent to distribute erroneous?

The SJC considered whether the jury instructions for possession with intent were erroneous and vague. First, the defendant argued that possession with intent to distribute requires possession of **usable** marijuana, not simply marijuana, and that the judge failed to make this distinction. Although the medical marijuana regulations contain a definition for "usable marijuana," the term is only used to explain certain regulatory requirements and in no way alters the meaning of "marihuana" under G. L. c. 94C, § 1. Based on this analysis, the SJC determined that the judge did not err in instructing the jury that the defendant need only possess marijuana, not usable marijuana, for the purposes of possession with intent to distribute.

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3rd Issue: Did the court properly instruct the jury on unlawful cultivation?

The Supreme Judicial Court found that the trial court did not clearly instruct the jury on illegal cultivation of marijuana in the context of the medical marijuana act. “The act creates two theories of unlawful cultivation of medical marijuana where the defendant produces evidence of a valid hardship cultivation registration: (1) unlawful cultivation of more than a sixty-day supply, and (2) unlawful cultivation for nonpersonal use.”

Under a theory of **unlawful cultivation of more than a sixty-day supply**, the jury must be instructed that (a) the defendant cultivated more than the amount necessary to provide a sixty-day supply of medical marijuana to the patient; and (b) the defendant did so intentionally. It is not enough that the plants happen to yield more than ten ounces in a sixty-day period; the medical marijuana regulations contemplate a patient's ability to return excess marijuana to a medical dispensary. **Rather, the Commonwealth must show that the defendant was intentionally cultivating more than the amount necessary to provide ten ounces of usable marijuana in a sixty-day period.**

By contrast, under a theory of **unlawful cultivation for nonpersonal use**, the jury must instead be instructed as to the following additional element: the defendant cultivated marijuana with the intent to distribute.

The trial court failed to instruct the jury that the defendant intentionally cultivated more than 10 ounces of usable marijuana in a sixty-day period. Therefore, the SJC reversed the defendant’s conviction for unlawful cultivation.

4th Issue: Did the Commonwealth present sufficient evidence of the defendant’s intent to distribute marijuana?

The SJC held that the number of plants is one factor that indicated the defendant was cultivating marijuana for non-personal use. Since the regulations fail to provide a limit on the number of plants that can be grown in home cultivation, the jury had to consider other factors that would indicate the defendant was cultivating marijuana for non-personal use. “The home invasion, large amount of cash found on the defendant, digital pocket scale, number of plants, and testimony that the defendant sparingly used marijuana plants were sufficient” to establish that the defendant was guilty of possession with intent to distribute. Based on all the above the factors, specific to this case, the SJC affirmed the conviction for possession with intent to distribute.

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